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SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

Supreme Court, U.S.
FILED

NOV 17 1986

JOSEPH F. SPANIOL, JR.
CLERK

JIMMY BOYD
Petitioner

VERSUS

McNEILAB, INC.
Respondent

On Appeal From the United States District Court,
Eastern District of Louisiana, State of Louisiana,
Honorable Morley L. Sear, Judge Presiding

JURISDICTIONAL STATEMENT AND
APPLICATION FOR WRIT OF REVIEW AND/OR
CERTIORARI TO REVIEW THE DECISION
OF THE FIFTH CIRCUIT COURT OF APPEALS

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Attorney for Jimmy Boyd

12/8/86



QUESTIONS PRESENTED

Is the granting of summary judgment based on "lack of evidence", an evidentiary factual finding prohibited by the Seventh Amendment?

LIST OF INTERESTED PARTIES

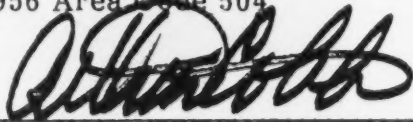
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

Jimmy Boyd, Petitioner
Arthur Cobb, Attorney for Petitioner

McNeilab, Inc. d/b/a McNeil
Pharmaceutical, Respondent
Richard B. Eason, Attorney for Respondent

By Attorney for Plaintiff

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A handwritten signature in dark ink, appearing to read 'Arthur Cobb', is written over a horizontal line.

ARTHUR COBB, Trial Attorney

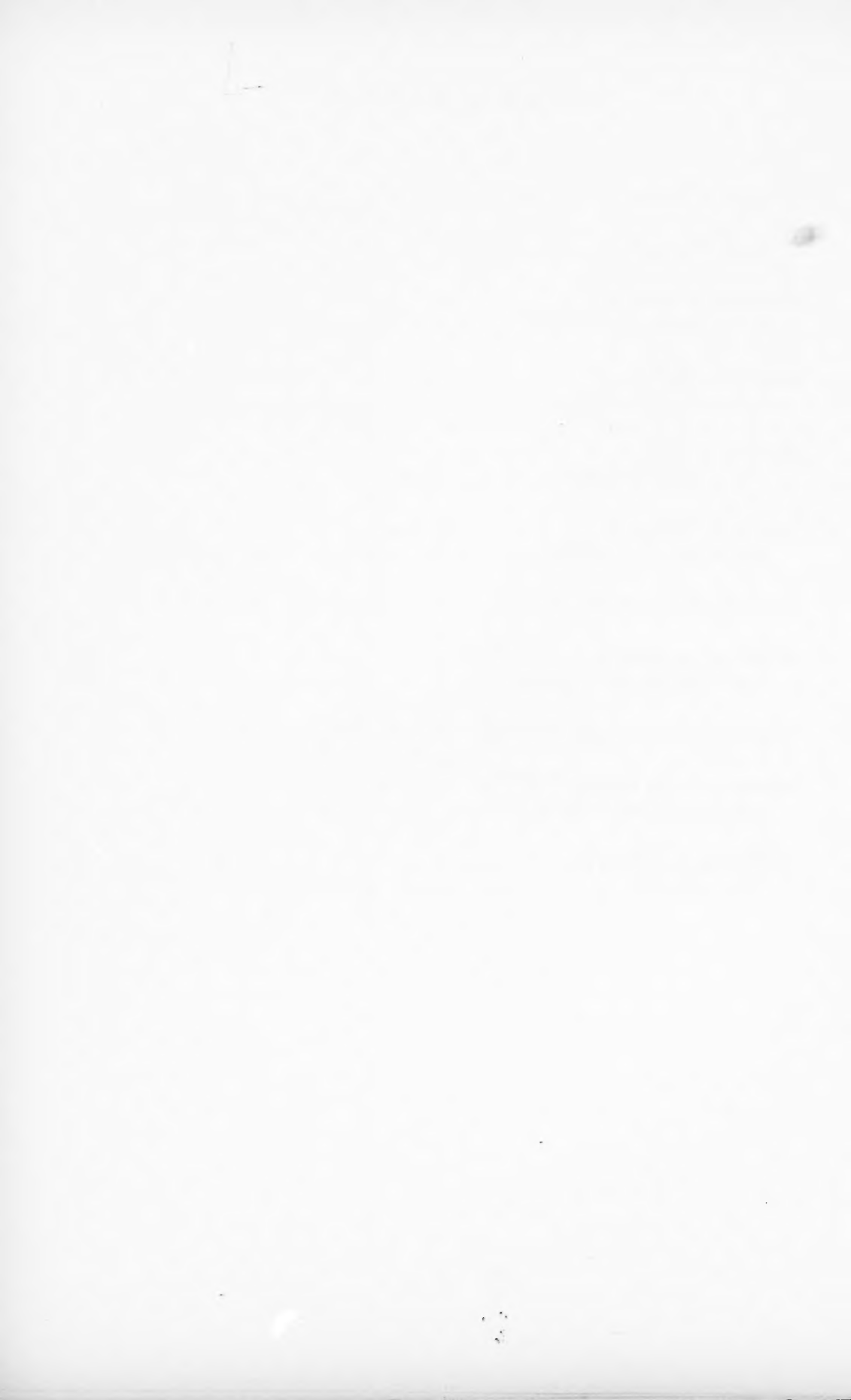
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LOWER COURT ACTION

The lower court granted defendant's motion for summary judgment on the grounds that defendant had more evidence, and the Fifth Circuit affirmed.

JURISDICTIONAL GROUNDS IN THIS COURT

The Judgment of the Fifth Circuit is dated 23 May 1986. The time of entry is 23 May 1986. The Statutory Provisions granting jurisdiction in this Court are:

28 USC 2101(c):

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Seventh Amendment:

AMENDMENT [VII.]

Civil trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Supreme Court Rule 17(1)(a):

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important rea-

sons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Plaintiff claimed personal injury by the ingestion of the drug Zomax. He had an expert pharmacologist and toxicologist's opinion that the drug was defective and that the defendant manufacturer failed to warn of the dangers. The trial court granted defendant's motion for summary judgment on the inadequacy of plaintiff's Expert's Affidavit. The Fifth Circuit affirmed.

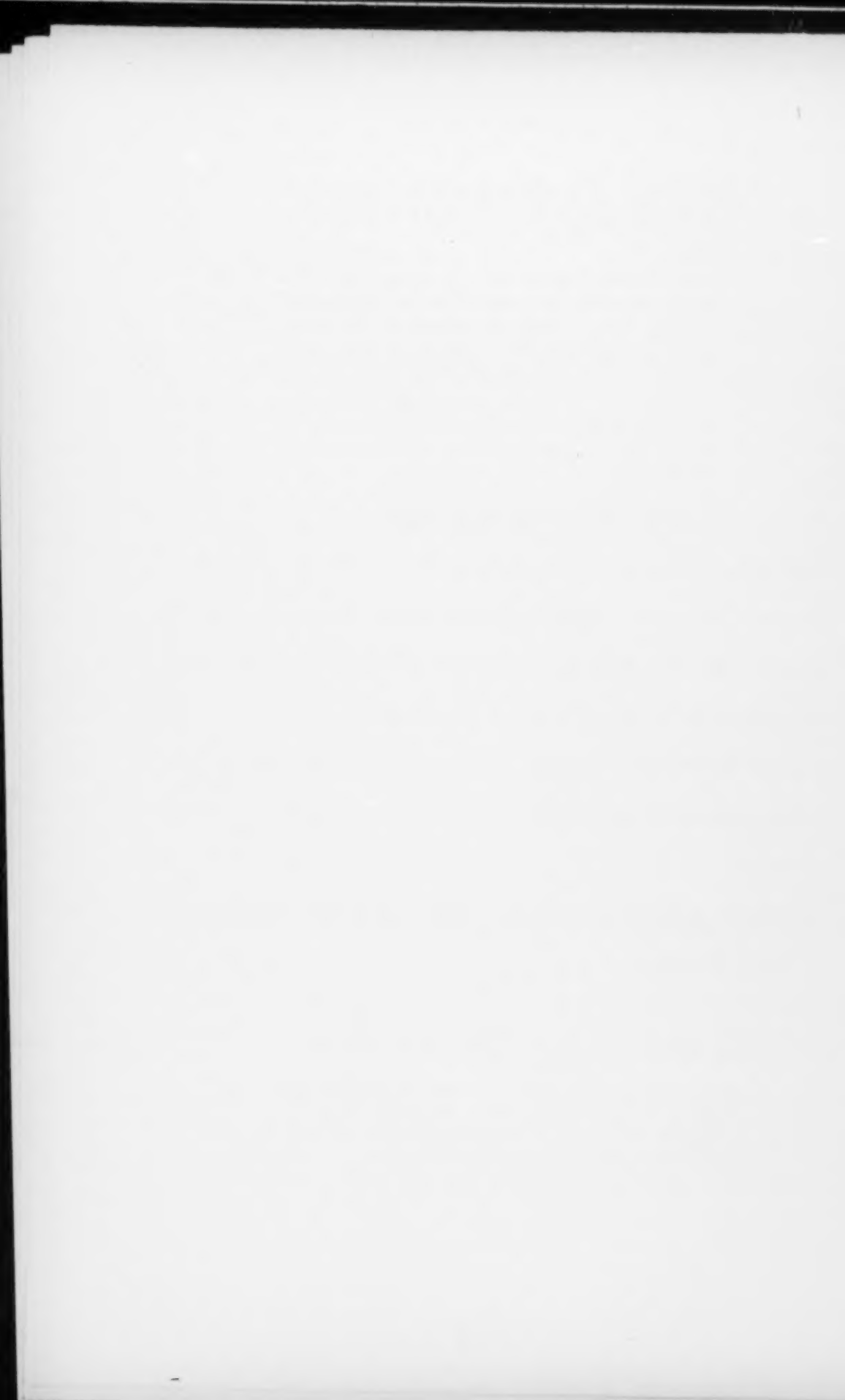
FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

28 USC 1332(a)(1):

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;



ARGUMENT

The United States Constitution, Amendment 7, provides that "the right to trial by jury shall be preserved". This language emphasizes the continuing protection of the Constitution. Judges may not invade the province of the jury.

Every motion for summary judgment should be scrutinized with utmost care. **Mandel v. U.S.**, 719 D.2d 963 (1983).

The idea that summary judgment is a drastic alternative and that reference should be given to full trial on the merits is strongly supported by the jurisprudence. **Ozark v. Allied**, 480 F.2d 1014 (1973).

A problem arises, however, because the trial judge often places himself in the capacity of weighing **factual** data for evidentiary purposes.

It should be asserted that in jury cases, the judge is not to try issues of fact. See **Warrior v. M/V NAN FUNG**, 695 F.2d 1294 (1983).

In a manufacturer's products liability action involving a prescription drug, as is the situation in the present case, the

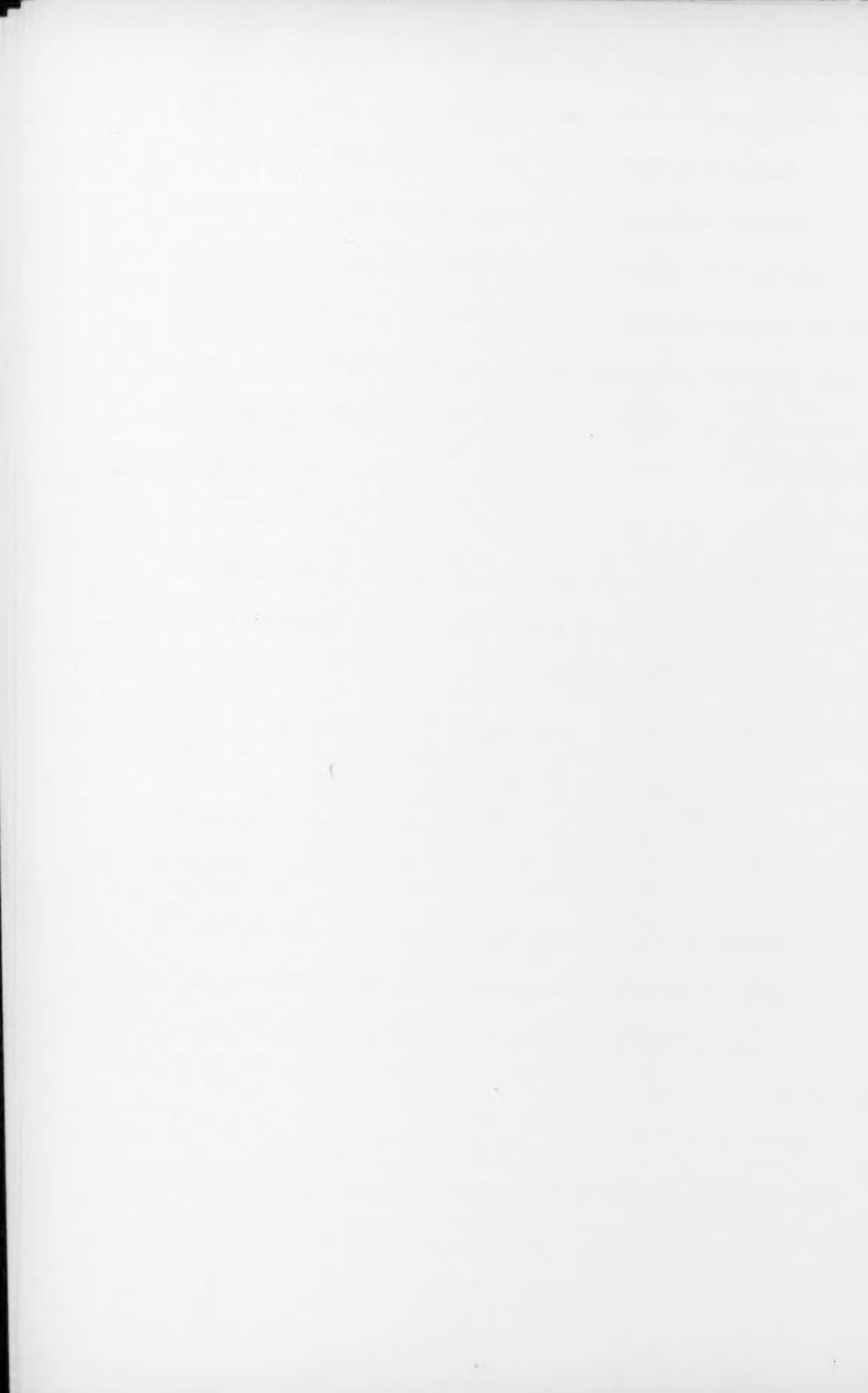
elements of causation and adequacy of warning are factual determinations and are therefore questions to be left to the jury. **Bernotas v. Harley**, 543 F.Supp. 519 (1982) re causation, and **Williams v. Lederle**; 591 F.Supp. 381 (1984); and **Stephens v. Searle**, 602 F.Supp. 379 (1985) re adequacy of warning. Even where parties may contend that facts are undisputed but that different **inferences** may be drawn, summary judgment is inappropriate. **Warrior v. M/V NAN FUNG**, 695 F.2d at 1296-1297.

As in the present case, weighing affidavits of the Experts as to their probative value was inappropriate. **Warrior v. M/V NAN FUNG**, 695 F.2d at 1299.

District court's function, in summary judgment proceeding, is not to resolve factual issues but to determine whether there exists a genuine issue of material fact, and in making its determination, court may not weigh conflicting affidavits to resolve disputed fact issues.

The proper course for the judge is to view the conflicting affidavits as generating a genuine factual dispute and leave the matter to trial on the merits See **Magill v. Gulf**, 736 F.2d at 979.

Mr. Boyd is not arguing the constitutionality of Rule 56 when it is applied properly. Here, Rule 56 was not applied properly.



Rule 56 should be applied only as to **questions of law**. In this case, Rule 56 was applied as **questions of fact**. Mr. Boyd **does** question the constitutionality of Rule 56 as to questions of **fact**.

Whenever a court rules that there is "lack of evidence" (i.e., that the "evidence" preponderates 51% vs. 49%, or 99% vs. 1%, or even 100% vs. 0%), the court is ruling on the **facts**. The Seventh Amendment mandates that the jury decide the **facts**.

Rule 50 can constitutionally be applied **only** as to questions of law.

CONCLUSION


The Seventh Amendment is a **prohibition** against **Judges** and holds down the authority and power of the **Judges**, yet it is the very same **judges** who interpret the Seventh Amendment and who are **reluctant** to tie their own hands with the provisions of the Seventh Amendment. These Judges have found ways to read FRCP 56 in such a way as to allow the **facts** presented to them via Affidavits to be decided by them summarily without being presented to a Jury. Rule 56 allows summary judgment as a matter of law only - otherwise, it would contravene the Seventh Amendment.



Here, the District Court and the Fifth Circuit Court of Appeals has so far sanctioned such a departure from the true meaning of the the Seventh Amendment that such a departure (summary judgment **on facts**) conflicts with a Constitutional Amendment and this Court is called upon to exercise its power of supervision.

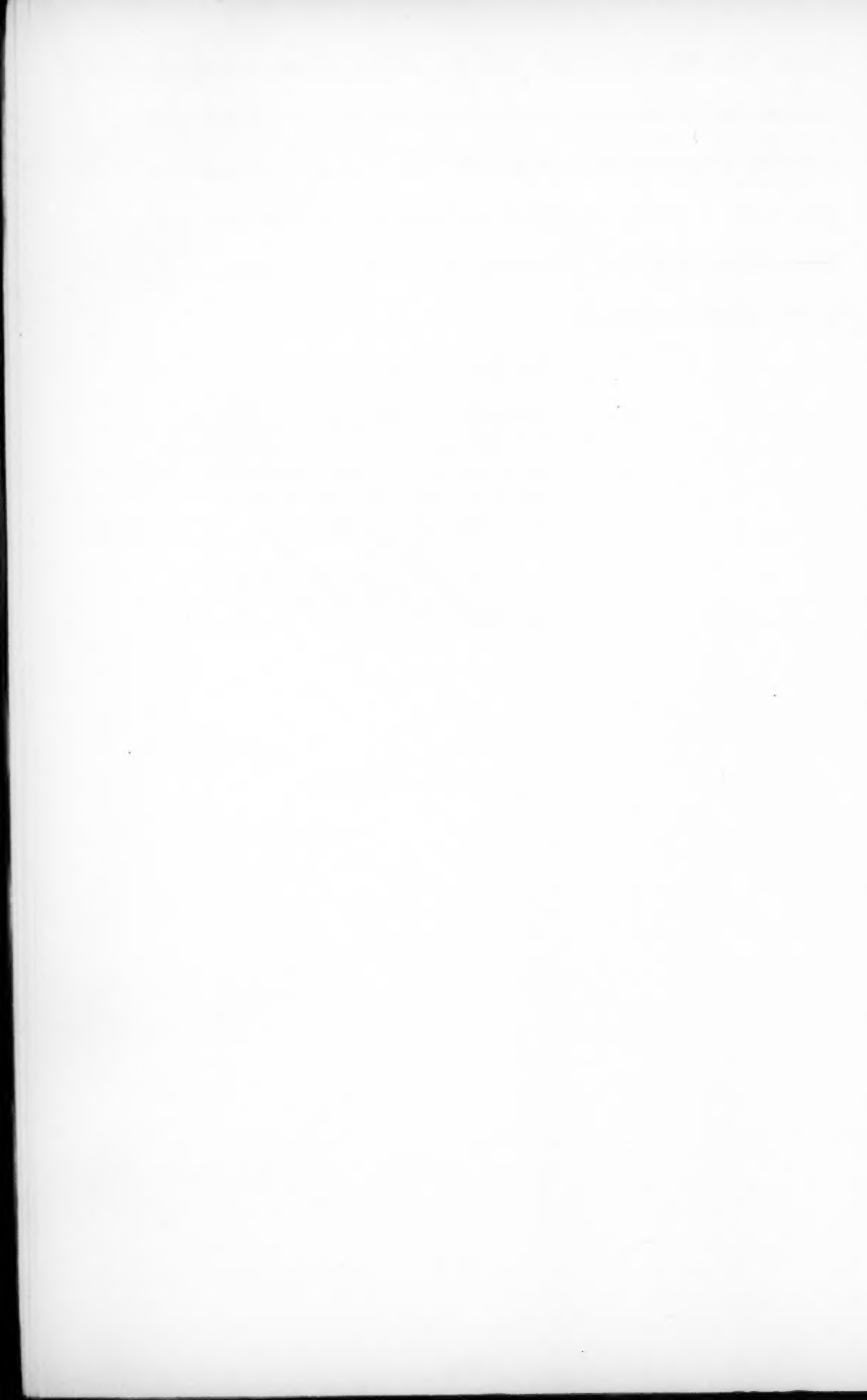
Respectfully Submitted:

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ARTHUR COBB, Trial Attorney

BEST AVAILABLE COPY



CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR COBB, who, after first being duly sworn by me, did depose and say that the allegations of the Petition for Writ of Review and/or Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same has been mailed to Richard B. Eason, II on 13 November 1986.



ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on 13 November 1986.


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